

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASSURANCE COMPANY OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION NO. 02-0537-P-M
)	
LEGENDARY HOME BUILDERS, INC.,)	
f/k/a FIRST AMERICAN BUILDERS, INC.,))	
RICHARD D. HORNE and PATRICIA)	
N. HORNE,)	
)	
Defendants.)	

ORDER MODIFYING THE REPORT AND
RECOMMENDATION OF THE MAGISTRATE JUDGE AND
STAY ORDER

On April 8, 2003, the Magistrate Judge issued a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), in this declaratory judgment action brought under 28 U.S.C. § 2201 (doc.20). The Magistrate Judge, after considering the Motion to Dismiss filed by defendants Richard D. Horne and Patricia N. Horne (“the Hornes”) (doc.14), and the Opposition filed by plaintiff Assurance Company of America (“Assurance”) (doc.17), recommends that the Hornes’ Motion be granted and that this action be dismissed without prejudice. Assurance filed a timely Objection (doc.25).

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions of the Report and Recommendation to which objection is made, the Recommendation of the Magistrate Judge is hereby MODIFIED as follows:

- 1) At page 6, ¶2, line 2, after “declaratory judgment action,” replace “the” with - this; and after

“Court is guided by,” replace “its” with - an;

2) at page 6, ¶2, line 3, after the citation “558 F.Supp. 596, 599 (S.D.Ala. 1983)” add - (J. Cox);

3) at page 6, ¶2, line 9, after “dismissing the declaratory judgment action,” replace “this” with - the;

4) at page 6, ¶2, line 11, after “underlying state court case had not yet been tried.” replace “This” with - The;

5) at page 7, line 3, after “Moreover,” replace “this” with - The;

6) at page 7, line 6, after “Alabama Code, § 27-23-2.” replace “This” with - The; and

7) at page 8, ¶2, line 12, after “such as that awarded to the Hornes against First American.” replace “This” with - The.

This court also notes that the Magistrate Judge states that “considerations of practicality and wise judicial administration dictate that the [c]ourt should decline to exercise jurisdiction in this action at this time” (doc.20, p.9). The Recommendation is further MODIFIED in consideration of Assurance’s request that this court stay the action (doc.25, p.6-7). This court notes that the issue of a stay was not before the Magistrate Judge.

Assurance notices this court that

a dismissal of this action will have the unintended effect of unnecessarily wasting the time and resources of both the parties and this Court. At this juncture, the Court has entered its Scheduling Order and the parties are to exchange initial disclosures..., which will include the voluminous production of documents by Assurance. To the extent the Alabama Supreme Court affirms the underlying judgment against First American [Builders, Inc.], the parties will be forced to re-litigate this dispute from scratch, beginning with the filing of another complaint for declaratory relief by Assurance in this Court... Neither the parties nor the Court should be forced to start anew when a stay will

preserve the status quo until any uncertainty regarding the underlying action is resolved by the Alabama Supreme Court.

(doc.25, p.6-7).

In Wilton v. Seven Falls Co., 515 U.S. 277 (1995), the United States Supreme Court noted that “where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy.” Id. at 288, n.2.

Herein, as noted by the Magistrate Judge, the \$750,000.00 jury award to the Hornes rendered in the Circuit Court of Baldwin County is currently on appeal to the Alabama Supreme Court (doc.20, p.2, footnote 1). It is this court’s opinion that a stay of this action, rather than a dismissal, would avoid any possible “gratuitous interference” with the orderly and comprehensive disposition of the action on appeal, Billhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942), while allowing this court and the parties to avoid, to the extent possible, piecemeal and duplicitous litigation. Wilton, at 283.

Accordingly, after due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions of the Report and Recommendation to which objection is made, the Recommendation of the Magistrate Judge is hereby MODIFIED as set forth herein, and insofar as the Hornes’ Motion to Dismiss without prejudice is DENIED; this court exercises its discretion under Wilton, 515 U.S. 277, to STAY all proceedings in this action pending resolution of the related state court action currently on appeal in the Alabama Supreme Court.

The Clerk is directed to close this file for statistical purposes only. Assurance is ORDERED to inform this court in writing within thirty (30) days following resolution of the appeal pending in the

Alabama Supreme Court, at which time the court will reopen this declaratory judgment action.

DONE this 3rd day of June, 2003.

S/ Virgil Pittman

SENIOR UNITED STATES DISTRICT JUDGE